DORA PHUA SIAW YEN

v.

SHAW BROTHER (KUCHING) SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUCHING
HAIDAR MOHD. NOOR J
[SUIT NO. KG. 124 OF 1989]
4 JANUARY 1990

CIVIL PROCEDURE: *Interlocutory injunction - Principles applicable - Whether there are serious questions to be tried - Lease or licence - Whether 2nd defendant estopped from evicting plaintiff.*

This is an application by the 1st and 2nd defendants to set-aside an interim injunction obtained against them by the plaintiff who operates a candy stall at their cinema premises.

The Court applied the principles laid down in *American Cyanamid Co. v. Ethicon* and accordingly examined whether there was a serious question to be tried.

The issues before the Court are as follows:

(1) Whether the agreement between the plaintiff and the 2nd defendant was a tenancy agreement or a licence, the latter being revocable under the said agreement.

(2) Whether the 2nd defendants by accepting the rents after the purported termination of "the licence" were now estopped from evicting her.

Held:

[1] The agreement entered into between the plaintiff and the 2nd defendant was merely a licence and the 2nd defendant is entitled to terminate the said licence in accordance with cl. 8 of the agreement. There is therefore no serious question to be tried.

[2] The 2nd defendants are not estopped from exercising their rights by virtue of receiving rents after the termination as the plaintiff had served them with the interim injunction and further such rents were received on a without prejudice basis.

[3] The interim injunction order granted to the plaintiff is therefore set-aside with cost to the 2nd defendant.

[Application allowed.]

Cases referred to:

American Cyanamid Co. v. Ethicon Ltd. [1975] AC 396
Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors. [1983] 1 MLJ 409
Merchant v. Charters [1977] 3 All ER 918
Yeap Mah Ee v. Kuan Kuan Chiew & Anor. [1988] 2 MLJ 389

Legislation referred to:

Evidence Act 1950, s. 115
Rules of the High Court 1980, O. 2, O. 29 r. 1(2), O. 41 r. 1(1), O. 41 r. 1(4), O. 41 r. 1(8)

For the plaintiff - Rosalind Tan; M/s. Lim, Tan & Partners Advocates
For the defendants - Patrick ak. Uren; M/s. Anek Uren & Partners Advocates

JUDGMENT

Haidar Mohd. Noor J:

On 29 July 1989 the plaintiff filed an *ex-parte* summons in chambers pursuant to O. 29 r. 1(2) of the Rules of the High Court 1980 ("RHC") for, *inter alia*, an order against the second defendant whether by itself, its directors, authorised servants or agents or otherwise howsoever be restrained until further order of the Court or the trial of this action:

(i) from forcibly and/or unlawfully evicting or cause to be evicted the plaintiff from that part of the premises measuring 21 feet by 12 feet and described as "the Candy Stall" in the building known as Capitol Theatre and situated on properties described as Lot 15, Lot 116 and Lot 118, all of s. 49, Kuching Town Land District "the said premises"; and

(ii) from taking over possession or control from the plaintiff, herself, her servants or agents or other however otherwise and enjoyment or howsoever interfering with the rights of possession of the plaintiff or howsoever committing any acts inconsistent with the rights of the plaintiff to possession of the said premises; and

(iii) that the plaintiff be at liberty to continue occupation and possession of the said premises for the purpose of carrying on the business of the Candy Stall.

The *ex-parte* summons in chambers is supported by the affidavit of Dora Phua Siaw Yen, the plaintiff. A certificate of urgency in respect of the *ex-parte* summons was filed by the Counsel for the plaintiff. The writ of summons was also filed on the same day.

I heard the *ex-parte* summons in chambers on 29 July 1989 itself and after hearing Counsel for the plaintiff I granted the interim injunction as prayed for by the plaintiff.

On 19 August 1989 the second defendant filed a summons in chambers (encl. 11) to set aside the interim injunction granted to the plaintiff on 29 July 1989. It is supported by the affidavit of Chung Bian Yieng, the Manager of Capitol Cinema, Kuching which is leased to and managed by the second defendant. A further affidavit was affirmed by Chung Bian Yieng on 24 October 1989 though the month was not stated therein. I will deal with this aspect later in my judgment.

The plaintiff filed an affidavit in opposition on 26 October 1989 (encl. 18) and an affidavit in reply on 4 December 1989 (encl. 25) and one affidavit by the plaintiff's brother, Robert Phua Siaw Kwang (encl. 24) dated 4 December 1989.

The Counsel for the plaintiff raised preliminary objection on the validity of the two affidavits affirmed by Chung Bian Yieng on grounds:

(1) Failed to state in the preamble whether the said Chung Bian Yieng has sworn or affirmed to the allegations therein as the affidavits merely states "makes" as required by O. 41 r. 1(1) of RHC.

(2) Failed to state the place of residence as required by O. 41 r. 1(4) of RHC.

(3) Failed to state in the jurat of the second affidavit (encl. 15) the precise date (month ?) the said affidavit was affirmed to as required by O. 41 r. 1(8) of RHC.

After hearing the explanation of Counsel for the second defendant I was satisfied that the preliminary objection is trivial and accordingly granted leave under O. 41 r. 4 of RHC for the use of the two affidavits.

Mr. Patrick Uren, Counsel for the second defendant objected to the use of the affidavit in reply dated 4 December 1989 (encl. 25) on the ground that it was served on him on 6 December 1989 and therefore does not comply with the four day rule as required by the Practice Direction or Note. On being pressed to be more definite, Mr. Patrick Uren promised to submit the relevant reference of the Practice Direction or Note later. Counsel for the plaintiff, Mr. George Chen conceded on the late service of encl. 25 and as such he intimated that he would not be relying on encl. 25. It was therefore not necessary for me to make any ruling. However on the date of the continued hearing Miss Rosalind Tan who stood and argued on behalf of the Counsel, Mr. George Chen, urged the Court to invoke its powers under O. 2 of RHC to allow the use of the affidavit (encl. 25) though conceded by Mr. George Chen earlier on. Mr. Patrick Uren objected to the application. As Mr. George Chen had conceded and did not see it fit to apply to the Court to invoke its powers under O. 2 of RHC, I am of the view this is not a proper case for me to invoke O. 2 of RHC which should have been applied for earlier by the Counsel as otherwise there will be no end to Counsels changing their minds on the concessions that they had made. In the circumstances the affidavit dated 4 December 1989 affirmed by the plaintiff (encl. 25) should not be considered by me. However, before writing this judgment I caused a check to be made about the Practice Direction or Note, as claimed and relied on by Mr. Patrick Uren and I am unable to find the relevant one. Neither did Mr. Patrick Uren, as promised, furnish me with one. I hope and trust that Mr. Patrick Uren did not intentionally mislead the Court when he made the objection on the use of the affidavit (encl. 25) earlier on. Be that as it may as a Counsel and officer of the Court it is his duty to see to it that the Court is not misled. In the circumstances I revoke my earlier decision and rule that the affidavit (encl. 25) can be used in this application.

The guidelines in the granting of an interim injunction or otherwise by the Courts was succinctly set out by the celebrated case of *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396. The guidelines may be conveniently classified as follows:

(a) a serious question to be tried;

(b) inadequacy of damages;

(c) the balance of convenience;

(d) special cases.

The issue for me to consider first here is whether there is a serious question to be tried. In other words the claim of the plaintiff is not frivolous or vexatious. As is established by numerous authorities the plaintiff does not need to show a *prima facie* case in obtaining an interim injunction. It is enough if she can show that she has a fair question to raise as to the existence of the right which she alleges. (see *Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors.* [1982] CLJ (Rep) 630 at p. 633). The plaintiff here claimed that the agreement between her and the second defendant is a tenancy agreement and not a licence as claimed by the second defendant. In the alternative she asserted that the second defendant by accepting without conditions the rents after the purported termination of the "licence" is estopped from evicting her. In the further alternative she claimed that the second defendant had no title to enter into a 'tenancy agreement' as the first defendant itself has no title to the land as it belonged to Sarawakiana Reality Sendirian Berhad (see Exhibits DP4, DP5 and DP6).

The crux of the matter is - was the transaction a licence or a tenancy? To this end perhaps the view taken by Lord Denning MR in *Merchants v. Charters* [1977] 2 All ER 918, 922 may be of help where the learned Master of the Roll stated:

> It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. **Eventually the answer depends on the nature and quality of the occupancy**. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room whether under a contract or not, in which case he is a licencee?
>
> (Emphasis added)

Going back to the agreement between the first defendant and the plaintiff (see Exhibit 'DP1') it is clear in my view the occupancy of the premises described therein in DP1 is clearly intended to be a licence on a monthly basis encompassing the terms and conditions of the licence. The plaintiff entered into the agreement without challenging the title of the first defendant. In fact in DP1 the first defendant did not claim to have title to the land but merely referring itself as "Grantor" and referring the plaintiff as "licensee". The terms and conditions in DP1 would clearly indicate the nature and quality of the occupancy i.e., she is not to have a stake or interest in the premises but DP1 licenses and authorises the plaintiff to enter and use the premises as described in the area coloured red on the plan attached thereto. In other words she was given permission to do the sale of refreshments and confectioneries there and no more. By Exhibit DP2 the plaintiff was notified that the Capitol Theatre was leased to the second defendant from 1 April 1987 and as such all the rights, title and benefit relating to the said theatre and adjoining car/motor cycle parks vested in the second defendant. The plaintiff was accordingly advised to contact the second defendant if she wished to continue operating the stall/care park **licensed** to her.

As a result, the second defendant notified the plaintiff vide Exhibit DP3 of the change of circumstances and enclosed the licence ('DP4') with the terms and conditions therein contained for the plaintiff to execute with the rental being increased to RM400 per month and the licence to take effect from 1 April 1988. The plaintiff acknowledged by accepting the licence on p. 3 of DP4. However according to para. 8 of her affidavit dated 28 July 1989 she claimed that she was **induced** to sign DP4. On the other hand when the plaintiff wrote to the second defendant on 2 April 1988 (see Exhibit 'DP5') she stated at para. 3 thereof that she was **advised** to sign DP4 and she did not say that she was **induced** to sign DP4. She admitted in para. 1 of DP5 that she received DP4 on 25 March 1988 but complained that the terms were not favourable to her especially as to the tenure on monthly basis which to my mind is no different from the licence she had earlier on with the first defendant. The plaintiff now claimed that her agreement with the first defendant is a tenancy agreement but for the reasons as stated earlier by me there are no merits in such a contention. In any event the plaintiff when notified by the second defendant to execute DP4 she did not disclose to the second defendant that the earlier agreement (DP1) with the first defendant was a tenancy agreement and hence she is estopped under s. 115 of the Evidence Act 1950 from presently making such an allegation (see *Chin See Lian v. Ng Wan Pit* [1973] 1 MLJ at p. 116). Looking at DP4 it is clear that DP4 is not a tenancy agreement as the nature and quality of the occupancy indicates that it is a licence. Further more nowhere it is alleged that the theatre is a rent-controlled premises and as such the case of *Yeap Mah Ee v. Kuan Kuan Chiew & Anor* [1988] 2 MLJ 389 is distinguishable with this case as at p. 396 Edgar Joseph Jr. J said:

> The present case it, of course, a *fortiori* because, as I have said earlier, a rent-protected tenant can always go back on his agreement to vacate in return for compensation since contracting out of the rent control legislation is contrary to public policy.

As DP4 is a licencee, the second defendant is perfectly entitled to revoke the licence in accordance with cl. 8 thereof where either party may terminate the licence by giving one month's written notice in advance. There is no necessity even to give any reasons for such termination and therefore the issue of the differences between the plaintiff and the second defendant's manager or the second defendant's having to explain that there was a need to do renovation to the theatre did not arise at all.

As regards the allegation of the plaintiff that the second defendant continuing to receive the rents after the termination of the licence, it is to be observed that the second defendant was served with the interim injunction order on 30 July 1989 and as such I do not see anything wrong for the second defendant to receive the rents as it does not know for how long the case may drag on. To mind it is not a question of a case of the second defendant after issuing a termination notice and subsequently after the expiry period continues to receive the rent. The situation is different here. In any event in the receipt of the rent for September 1989 (DP2) the second defendant did indicate that it was received without prejudice. Therefore there is no merit in such an allegation that the second defendant is estopped from terminating the licence.

As regards the allegation of lack of title on the part of the first and second defendants, I must say here that such allegation is frivolous as the first and second defendants never claimed that they were the owners of the land on which the theatre is.

On the available affidavits and the documents filed, it is abundantly clear to me that there is no serious question to be tried and suffice for me to say that in my view, the plaintiff's claim is frivolous and vexatious. In short the action of the plaintiff is to forestall the second defendant from evicting her. In the circumstances I set aside the interim injunction order granted to the plaintiff with costs to the second defendant to be taxed. The Senior Assistant Registrar will assess the damages on a date to be fixed.

Also found at [1990] 1 CLJ 1249